IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

MONDAY, THE 12TH NOVEMBER 2007 / 21ST KARTHIKA 1929

FAO.No. 171 of 2007()

AS.34/2001 of PRL.SUB COURT,TRIVANDRUM
(AS NO.102/2001 OF DISTRICT COURT, THIRUVANANTHAPURAM)
O.S.NO.1182/1997 OF FIRST ADDITIONAL MUNSIFF COURT,
THIRUVANANTHAPURAM.

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APPELLANTS/RESPONDENTS/DEFENDANTS

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1. NANUKUTTAN, S/O SANKARAN,
   RESIDING AT OPPOSITE SIDE OF GIRLS HIGH SCHOOL,
   PATTOM, THIRUVANANTHAPURAM (ORIGINAL ADDRESS
   ARUNALAYAM, T.C.3/2545, PATTOM P.O.,
   MARAPPALAM, THIRUVANANTHAPURAM)

2. LALITHA KUMARI, D/O DEVAKI,
   RESIDING AT OPPOSITE SIDE OF GIRLS HIGH SCHOOL,
   PATTOM, THIRUVANANTHAPURAM (ORIGINAL ADDRESS
   ARUNALAYAM, T.C.3/2545, PATTOM P.O.,
   MARAPPALAM, THIRUVANANTHAPURAM)

BY ADV. SRI.D.KISHORE

RESPONDENTS: APPELLANTS/PLAINTIFFS

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1. GOPALAN BALAKRISHNAN, S/O GOPALAN,
   KRISHNAVILASOM BUNGLAW,
   KOCHU KARAPARAMBU VEEDU, PATTOM,
   KOWDIAR VILLAGE, PATTOM PALACE P.O.,
   THIRUVANANTHAPURAM.

2. LEELA, W/O BALAKRISHNAN NAIR,
   KRISHNAVILASAM BUNGLAW,
   KOCHU KARAPARAMBU VEEDU, PATTOM PALACE P.O.,
   THIRUVANANTHAPURAM.

BY ADV. SRI.L.MOHANAN

THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR ADMISSION ON 12/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R."

K. PADMANABHAN NAIR ,J.

F.A.O.No.171 of 2007

Dated, this the 12th day of November, 2007

JUDGMENT

Heard. Admitted. Advocate Shri L.Mohanan takes notice for respondents. Appeal itself is heard and disposed of as agreed to by both sides.

2. The defendants in O.S.No.1182/1997 on the file of the First Additional Munsiff Court, Thiruvananthapuram who were respondents in A.S.No.34/2001 on the file of the Principal Sub Judge, Thiruvananthapuram (A.S.No.102/2001 of District Court, Thiruvananthapuram) are the appellants. The following substantial questions of law arise for consideration in this appeal:

(1) Whether a counsel who had appeared for a party before the trial court can be presumed to have knowledge about the filing of the appeal? and

(2) Whether he can be imputed with the knowledge of filing of any appeal so as to appear for the party for whom he had appear before the trial court.

3. The respondents filed O.S.No.1182/1997 before the First Additional Munsiff Court, Thiruvananthapuram for a declaration and injunction. The appellants appeared and contested the matter. The trial court after appreciating the evidence found that there was clear boundary to separate the respondents/plaintiffs' property from that of appellants/defendants and dismissed the suit. Challenging that decree and judgment the respondents/plaintiffs filed

A.S.No.102/2001 before the District Court, Thiruvananthapuram which was subsequently made over to the Principal Sub Court, Thiruvananthapuram and re-numbered as A.S.No.34/2001. The lower appellate court raised one point which reads as follows:

> "Whether the judgment and decree of the trial court are liable to be confirmed or set aside?".

The lower appellate court after hearing the counsel appearing for respondents/plaintiffs allowed the appeal, set aside the judgment and decree passed by the court below and remanded the matter. It is recorded that the appellants/defendants did not appear and argue the case in spite of receipt of notice. After remand a commissioner was deputed and when the commissioner issued notice the appellants filed a review petition before the lower appellate court which was dismissed. Then they filed Writ Petition as W.P.(C) No.18562/2007 before this Court challenging the order passed in the review petition. The learned Principal Sub Judge has forwarded the original Appeal Memorandum in its original form along with proceedings paper to this Court. A perusal of the same shows that the appeal was filed on 19.5.2001 before the District Court, Thiruvananthapuram. Subsequently it was made over to the Principal Sub Judge's Court, Thiruvananthapuram and re-numbered as A.S.No.34/2001 and posted for admission to 22.5.2001. On 22.5.2001 it was adjourned to 18.6.2001 and then to 19.6.2001. On 19.6.2001 the appeal was admitted and and notice was ordered

and posted the case for appearance of respondents to 13.8.2001. On 13.8.2001 office made a note to the effect that the respondents did not take any steps to issue notice and so notice could not be sent. But on that day the court noted that appellants/defendants (respondents in A.S.No.34/2001) appeared. Learned Sub Judge also called for the records and subsequently appeal came up for hearing on 18.10.2002. Sub Judge had noted that both sides were present. On 4.7.2006 the lower appellate court had noted that respondents/plaintiffs were represented by their lawyer. The appellants/defendants were called and noted as absent. The court below had also noted the name an Advocate who was appearing for the appellants before the trial court. The case was posted for judgment to 11.7.2006. On 11.7.2006 the counsel for the appellants filed I.A.No.2882/2006 for appointing a commissioner. The Sub Judge posted the case to 18.7.2006. On 11.7.2006 the lower appellate court noted that the Advocate who was appearing for the appellants was absent. On 18.7.2006 court below allowed the appeal, set aside the judgment and decree passed by the trial court and remanded the case for fresh disposal.

4. In this appeal it is pointed out by the counsel for the appellants that Advocate Shri C.S.Sukumaran Nair who was stated to have entered appearance for the appellants/defendants before the lower appellate court had filed an affidavit in W.P.(C) No.18562/2007. He had stated that he never appeared for the appellants/defendants before the lower appellate court. He had also stated that he

was not engaged by the appellants/defendants nor did he appear and file vakkalath for the appellants/defendants before the lower appellate court. The records show that no notice was issued to the appellants/defendants. Somebody made a representation before the lower appellate court that appellants/respondents 1 and 2 appeared. But no vakkalath or memo of appearance for the respondents was filed. There is nothing on record to show that the copy of the Appeal Memorandum was served on the respondents. The stand taken by the respondents/plaintiffs is that since the appellants/defendants had appeared before the trial court they were duty bound to appear before the lower appellate court also without any fresh notice. I find it extremely difficult to accept that contention. A lawyer is bound to appear for a party if he is properly instructed. In this case the appellants/defendants never informed about the filing of the appeal. Notice was not issued to the appellants as ordered. Considering all aspects of the matter I am of the view that the lower appellate court should have corrected the mistake. So the judgment and decree passed by the court below setting aside the judgment and decree passed by the trial court and remanding the case without affording an opportunity to the appellants/defendants are illegal and unsustainable and are liable to be set aside.

In the result, appeal is allowed. The judgment and decree dated 18.7.2006 passed by the lower appellate court in A.S.No.34/2001 are hereby set aside. Learned Principal Sub Judge, Thiruvananthapuram is directed to take

A.S.No.34/2001 back to file and dispose of the same afresh after hearing both sides. Parties shall appear before the court on 17.12.2007. I make it clear that no fresh notice need be given to both sides in view of the notice given by this Court. Lower appellate court shall try and dispose of the matter as expeditiously as possible, at any rate, within a period of four months from the date of appearance of parties before it.

I.A.No.2232/2007 will stand dismissed.

K. PADMANABHAN NAIR,
JUDGE.

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